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Opinion following rehearing

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>JOSEPH DANIEL TABRON et al.,<br>Defendants and Appellants. | A144079<br><br>(Alameda County<br>Super. Ct. Nos. C172865A,<br>C172865C, C172865D) |

## I.

## INTRODUCTION

Joseph Daniel Tabron, Joseph Manuel Castro, and Joseph Robert Silva appeal their convictions for the felony murder of Noe Garcia and Trisha Forde that occurred in the course of a home-invasion robbery and kidnapping. Appellants allege the trial court improperly denied their *Batson/Wheeler*[1] motion for dismissal of two African-American jurors. They argue the trial court should have suppressed Silva's confession as both violating *Miranda*[2] and because it was not voluntary. Appellants further argue the trial court failed to provide jury instructions on defense theories and improperly denied their motion for acquittal at the close of the prosecution's case. Silva alleges the court should have provided an instruction on voluntary intoxication for him. Castro argues the court improperly admitted his prior conviction for theft to show intent.

[1] *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

A prior panel of this division, in an opinion authored by then Presiding Justice Ruvolo, rejected these arguments and affirmed all three convictions in an opinion filed on November 28, 2017. The Supreme Court granted review on the issue of the lesser-included offense instructions for the murder charges and transferred the case back to us for reconsideration in light of *People v. Gonzalez* (2018) 5 Cal.5th 186 (*Gonzalez*). In a December 7, 2018 opinion authored by Superior Court Judge Elizabeth Lee, sitting pro tem in our division, we concluded that any lesser included offense instructions were not supported by substantial evidence, that any error in failing to provide them was harmless error, once again affirmed, adopting the prior panel's opinion in all other respects.

Appellant Castro then filed a petition for rehearing arguing that, because he was convicted on an aiding and abetting theory, and because this case was not yet final on appeal, he should be entitled to avail himself of the ameliorative benefit of recently enacted Senate Bill 1437, which amended the felony murder rule and the natural and probable consequences doctrine as that body of law relates to murder. (Stats. 2018, ch. 1015, § 1, subd. (f).) Because Senate Bill 1437 was set to become effective as of January 1, 2019, we granted rehearing and ordered supplemental briefing to be filed by Silva and Tabron so that we may consider the Senate Bill 1437 issue with respect to all three appellants.

Following the expiration of Judge Lee's pro tem term, a third panel of this court has given plenary consideration to all of the issues in these appeals, including the Senate Bill 1437 issue. We once again affirm the convictions, adopting our prior two opinions without change, except that we now resolve the issue of section 1170.95's retroactive application. We decline to give any of the appellants the ameliorative benefit of Senate Bill 1437 on appeal. While we recognize that the Legislature intended Senate Bill 1437 to have retroactive effect, it established a resentencing petition procedure under section 1170.95 for this purpose. Following our remand to the trial court, the appellants may resort to that procedure here to the extent they are eligible for it.

## II. FACTUAL AND PROCEDURAL BACKGROUND

### A. *Procedural History*

The amended information charged four defendants—Tabron, his brother, Jeffrey Tabron, Jr.,[3] Castro, and Silva—with murder pursuant to Penal Code section 187,[4] subdivision (a) of Noe Garcia (count one) and Trisha Forde (count two). The information alleged firearm enhancements for all defendants pursuant to section 12022, subdivision (a)(1). It charged Tabron with the special circumstance of robbery for both murders (§ 190.2, subd. (a)(17)(A), and kidnapping and multiple murders for Forde's murder (§ 190.2, subd. (a)(17)(B)). Count three charged Tabron with being a felon in possession of a firearm. The information further alleged that Tabron had two prison priors, Castro had ten prison priors, and Silva had one prison prior (§ 667.5, subd. (b)).

The case was tried before a jury from October 28 to December 17, 2014. The jury found appellants guilty of all three counts; it found the robbery and kidnapping special circumstance allegations true for Tabron, but did not find true the multiple-murder special circumstance. The jury found true that Tabron was armed with a firearm, but did not find that Castro or Silva was armed with a firearm during the commission of the offense.

The court found true both of Tabron's prior convictions. The court sentenced him to four years plus two consecutive terms of life without parole. The court found true eight of Castro's 10 prior convictions, but dismissed the priors in the interests of justice. The court sentenced Castro to a term of 50 years to life. The court found true Silva's prior conviction, but dismissed it in the interests of justice. The court sentenced Silva to a term of 50 years to life.

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[3] We will refer to Jeffrey Tabron as Jeffrey or by his nickname Twin, and appellant Joseph Tabron as Tabron, because all three appellants share the same first name. The trial court granted Jeffrey's motion to sever his case from his codefendants.

[4] All further references are to the Penal Code unless otherwise identified.

**B.** ***Evidence at Trial***

Brothers Esteban and Raul Gonzalez[5] lived in a blue house (Gonzalez house) near the corner of Apricot and Blenheim Streets in Oakland. Numerous other people lived in the house including Esteban's wife, Dana, their son Esteban Gonzalez, Jr. (Esteban, Jr.), Jose Mendoza, and Martin Ascencio. Esteban and Esteban, Jr. were drug dealers.

Tabron lived on 107th Avenue, right around the corner from the Gonzalez house. Tabron also was a drug dealer. Castro, who was Tabron's uncle, lived with him. Silva lived in San Leandro but had frequently stayed in the Gonzalez house a few years before. Both Castro and Silva were longtime methamphetamine addicts.

Esteban, Jr. owed Tabron money for drugs. His father, Esteban, told Tabron he would pay the debt, but he had failed to do so.

At 3:00 a.m. on March 2, 2013, Raul was in his bedroom using his laptop computer. He heard a knock on the door and when he opened it, a man he did not recognize asked for Dana. When he opened the security door, Tabron came around from the side with a silver nine-millimeter gun in his hand. Raul recognized Tabron because he frequently came to the house to see Esteban, Jr. because Esteban, Jr. sold drugs for Tabron. When Raul saw the gun, he was scared. He took Tabron and the other man, Taco,[6] to Dana's room. There were three or four people in the bedroom. Tabron told them all to face the wall. Raul testified that Tabron and Taco switched off holding the gun.

Tabron appeared intoxicated and was staggering. Raul said although Tabron was drunk, he knew what he was doing.

Tabron began taking things from the room because Esteban, Jr. owed him money. Tabron instructed Taco to take Dana's television, her laptop, and all the lotions on her headboard.

Tabron left Taco with the gun watching over the people in Dana's room and escorted Raul to his room. Tabron took bobble-head figures, a laptop, and a TV, which Raul helped

[5] We will hereafter refer to the members of the Gonzalez family by their first names (Esteban, Raul, Esteban, Jr., and Dana).

[6] The man with Tabron was never identified, but Tabron called him Taco during the robbery.

Tabron carry to a white car waiting with the engine running. Raul was not able to see the driver well, but he believed it was an African-American man with short hair.

When Raul returned to the house, Tabron told him he was going to hit him in the back of the head so it did not appear he was giving Raul special treatment. Tabron then hit Raul, but it did not hurt. When they entered Dana's room, Taco handed the gun to Tabron.

Jose Mendoza was in his room in the basement playing dice with Esteban, Jr., "G" and an African-American woman. Mendoza heard Tabron say that they should bring him upstairs and a person (Taco) appeared in the doorway with a gun. Mendoza testified that Tabron and Taco each had a gun when he saw them. Everyone gave Tabron their cellphones and wallets. After that, Tabron's uncle, Castro, looked into the room smiling. Castro was walking around in the house and Raul saw him in the kitchen. Raul and Castro were not friends and there was no reason for Castro to be at his house at 3:00 a.m. Neither Raul or Mendoza saw Silva the night of the robbery.

Raul testified that Tabron and Castro took a TV from Dana's room. Mendoza testified that he heard Castro's voice saying he was going to help, but he did not see him. He heard Tabron say, "Uncle, what are you doing here?" and Castro said he was there to help.

There was another woman Raul did not know at the house that night, Trisha (Forde). She walked into Dana's room in the middle of the robbery. Tabron told Forde to sit with the rest of the people in the room. Tabron and Forde talked briefly.

Tabron told everyone to lie face down on the ground. He told them if they talked to the police, he would come back for every single one of them. As he said it, he pointed the gun at each person. Mendoza remembered that Tabron said not to call the police or he would kill them. He told Forde that she was coming with him. Raul testified that Forde looked scared; however, Mendoza testified Forde did not appear scared.

After Tabron, Taco and Forde left, less than a minute later, Raul heard a male voice say "who are you?" and a different male responded "who the hell are you?" Then he heard gunshots. He heard three or four shots, then a woman screaming and about five to seven more gunshots. He then heard the screeching of car tires.

Mendoza heard two or three gunshots and then a woman screamed. He heard a man say "bitch" and then more gunshots. The voice sounded like Tabron's voice.

Approximately two minutes after the gunshots, the people in the room began to get up and Dana said she was going to go see what was going on. Raul went outside and saw a man lying in the street on Blenheim. He did not know the man. He then saw Forde's body. Everybody was rushing to leave. When the police arrived, Raul did not talk to them because he was scared that word would get back to Tabron. Mendoza was similarly too scared to talk to the police.

Mendoza saw Castro outside the house when he went out to see what happened after the gunshots. He was walking alone on Apricot Street.

Several witnesses also heard the gunshots. Around 4:00 a.m., J.H. was asleep in his house in the 10000 block of Apricot Street and he was awakened by multiple gunshots. He called 911. R.G., who lived on Blenheim Street, had a surveillance camera on the outside of her home. Her house was near the corner of Blenheim and Apricot Streets. She heard several shots and then, less than 10 seconds later, she heard more shots. The first set of shots sounded a bit farther away, and the second set was right in front of her house.

Oakland Police Technician Hurtado testified that Forde's body was in front of 10730 Apricot Street on the sidewalk. Hurtado collected 5 nine-millimeter cartridge cases around Forde's body. He also collected two more nine-millimeter cartridge cases on Apricot and one near the corner of Apricot and Blenheim. A firearms expert, Susan Molloy, testified that five of the cartridges were fired from an Uzi.

Technician Hurtado found 8 nine-millimeter cartridges near Noe Garcia's body. There were a total of 15 nine-millimeter cartridge cases at the scene; eight were fired from an Uzi, and seven were fired from a nine-millimeter handgun. Hurtado also found two 7.65-millimeter live rounds at the scene.

Dr. Thomas Rogers, the forensic pathologist who performed the autopsies of both victims, testified that each died from multiple gunshot wounds. Garcia had nine gunshot wounds to the back of his head, both thighs, both sides of his buttocks, his left knee and his lower back. He had a grazing wound on his right hand. Six of the gunshot wounds were to the back of Garcia's body. Garcia had some gunshot residue on his right hand.

Forde had six gunshot wounds plus two grazing wounds. The shots were to the back of her head, her left upper arm, her back, her thigh, and her buttocks. The shots were fired at close range, with the shot to the back of her head being the closest. She was shot in the back four times. The toxicology report for Forde showed high levels of methamphetamine in her system, along with amphetamine and alcohol.

An inspector from the Alameda County District Attorney's Office, Shawn Knight, testified about text messages between Forde and Esteban, and Forde and Garcia, on the night of the murders. Garcia and Forde texted each other from 12:15 a.m. to 3:23 a.m. about meeting. At 3:23 a.m., Forde sent a text to Garcia that reads: "OMG [Oh My God]. Hold up."

### C. *Silva's Confession and Trial Testimony*

#### 1. Silva's Interrogation[7]

At the beginning of the interrogation, Oakland Police Officer Perez-Angeles asked Silva if he needed to use the bathroom or needed anything else before they started and Silva replied: "I'm okay right now." Officer Perez-Angeles read Silva his rights and asked if he understood each of these rights as he had explained them. Silva replied "yes." Silva signed the form acknowledging that the officer read him his rights.

Officer Perez-Angeles informed Silva he was investigating a double homicide and Silva's name came up in the investigation, but he knew Silva did not shoot anybody. Silva replied that he would tell him exactly what happened. He said he went out with Twin (Jeffrey) earlier in the evening. Silva stated he was selling crank (methamphetamine).

At this point, Silva asked Officer Perez-Angeles, "This—none of this is gonna be used in court is it?" Officer Perez-Angeles responded: "This is between me and you right now, bro," and Silva said alright. Silva then explained he bought an "eight ball" and he was bringing back the money. He went to Tabron's house and knocked on the garage where Castro normally stayed, and he did not answer.

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[7] The prosecution introduced a redacted version of Silva's interrogation that deleted any reference to his codefendants. When Silva testified, he introduced the complete interrogation.

When Twin showed up, he asked Silva to help with a TV. He had a flat screen TV, laptops, and other items in his car and asked Silva to put them in his truck. Silva agreed. He went with Twin to the Gonzalez house to get another TV. "Some black dude" came out with a second TV. Silva put the TV in his truck and took it to "a storage place."

Silva said he was a little tipsy because he had a couple drinks so he "wasn't thinkin' in my right mind or I would've thought better." When he helped with the second TV, "red flags went up" and he knew "somethin' was goin' down."

Officer Perez-Angeles told Silva that he heard he went in the house, and Silva swore he did not. He never saw Castro at the Gonzalez house. He stated he did not see anyone get shot. He did not see Twin with a gun.

The officers told him they knew he was involved and he needed to tell the truth. At this point, Silva stated there were "[p]eople on the ground. Somebody holding a gun," but they had masks on. He then admitted he was in the house and saw people lying on the floor in the back bedroom. He said: "As soon as he shot that guy, I ran. I see him point the gun and then shoot it." He stated he heard just one gunshot. He identified Tabron as the shooter, but also said that Twin had a gun.

When the officers asked Silva if he was part of the robbery and what he was responsible for, Silva stated: "Do I need a lawyer?" Officer Perez-Angeles responded: "I can't give you any legal advice, bro." Officer Perez-Angeles then stated: "We're just asking you questions. We know that you didn't kill those two individuals, that we know." Silva responded: "Yeah." Silva stated that he was starving and he needed something to eat. Officer Perez-Angeles told him they would take a break and get him some food and offered to get McDonald's.

When the interrogation continued, Silva explained when he went back into the house a second time, one of the robbers was coming out of the house with a woman. The robber had a hood on so Silva did not see his face. He saw him push her and say, "Get out the door." He thought the woman was White or light-skinned Black with blonde hair.

**2. Silva's Testimony at Trial**

Silva testified that he met Tabron at a restaurant on the night of the incident. Tabron and his brother (Twin) were there and four or five other people he did not know. He had

half a cocktail. When he left the restaurant he had "a little buzz." He got an "eight ball," or eighth of an ounce of methamphetamine, from Tabron and sold half to a friend. He went home and assisted his mother who had dementia, smoked meth with a friend, and then drove to Tabron's house to pay him. Nobody was home.

At this point, Jeffrey drove up and asked for help unloading the TV from his car. Silva put the TV in his truck and Jeffrey asked him to come and help with another TV. They arrived at the Gonzalez house, and he saw two people carrying out a TV. They put the TV in Silva's truck. After that, he left and went home. He never saw Tabron, but he called him when he got back to his house. He then went to Tabron's house and a person he did not know unloaded the TV's.

He never saw anyone get shot outside the Gonzalez house. He testified that he heard different versions of what happened, but in two versions Esteban Gonzales had shot two people that night outside the house.

Silva testified that he said he saw Tabron firing a gun because he believed that Tabron had told the police Silva was involved with the robbery. He told them he saw a body on the ground because he "knew there was supposed to be one there." Officer Perez-Angeles led him to believe that Tabron had identified him. The officers kept telling him he went inside so he just said that he had gone inside.

Silva testified he left the Gonzalez house with the two TV's around 4:05 a.m. and he did not see Garcia or Forde's bodies, but a ShotSpotter gunshot detection system registered the shots at 3:54 a.m.

Silva stated that he was able to list what stolen items he saw, i.e., two TV's, laptops, and a sound system, during his police interview because he had gotten that information from Esteban. The prosecutor, however, pointed out that he had testified that Esteban had not told him about the robbery. Silva admitted that nobody told him that someone in the house was holding a gun, but he told Officer Perez-Angeles someone had a gun. He also admitted that the officers never suggested that Tabron pushed a woman out of the house; yet that is what he said during his interrogation. He further admitted that no one suggested to him or told him that Tabron shot a man, but in his interrogation Silva said after Tabron fired the gun, he ran away. He stated that he said Tabron had a gun in order to retaliate against him.

## III.

## DISCUSSION

### A. *The Trial Court Properly Denied Appellants' Batson/Wheeler Motion*

Appellants argue the trial court improperly denied their motion challenging dismissal of two African-American jurors.

#### 1. Voir Dire

During voir dire, Juror L[8] stated that the criminal justice system seemed "unbalanced." He said: "I think it's unbalanced sometimes based on this video that I saw about false confessions, and they can put people into jail." He was a criminal justice major because he wanted to be a police officer, but he no longer wanted to pursue that path and he was considering being a correctional officer after serving in the Navy. The incident in Ferguson, Missouri changed his mind about becoming a police officer.

Juror D requested to answer questions confidentially so the court questioned him in chambers. He stated he had family members who sold drugs and had been in prison. He said some people who commit crimes belong in prison but others do not. He testified in a relative's death penalty case about the relative's good character. When asked if he could be fair, he responded that he thought he could be fair, but "I'd just prefer not [to] deal with a situation like this." He stated that he had interactions with the police in the 1970's and 1980's that were both good and bad. He stated he could follow the court's instructions, but he wanted to be separated from anything criminal and did not want to deal with this type of situation.

The prosecutor requested the court excuse Jurors L and D. Defense counsel objected under *Batson*/*Wheeler* because both jurors were African-American. The court responded that based upon the fact both jurors stated they could be fair and impartial, the court found there was a prima facie case and the prosecutor must state her basis for excluding the jurors.

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[8] During voir dire the two dismissed jurors were seated as Jurors 14 and 17. At some point, however, they moved to seats 3 and 7. The parties referred to them by their last names at the *Batson/Wheeler* hearing and in their briefs on appeal. To preserve the potential jurors' privacy, we will refer to them by their last respective last initials.

For Juror L, the prosecutor explained that he was slouching the entire time. Juror L was a criminal justice major who felt the criminal justice system was "not balanced." He had recently watched a video regarding false confessions. Juror L indicated that he no longer wanted to be a police officer because of the incident in Ferguson, Missouri where an officer shot a young man. The prosecutor stated that based upon his responses, she felt he could not be fair to the prosecution given his negative view of the police. Further, Juror L indicated that he did not want to be there. The prosecutor stated: "I don't want a juror who does not want to be here."

Juror D stated that he had many relatives who sold drugs, who had been charged with crimes, and who had been in prison. He was a character witness for a relative in a death penalty case in the early 2000's. He indicated that he did not like to be around "these type[s] of situations where people are charged with crimes." He also indicated that he did not want to be there. The prosecutor stated that based upon his answers, she did not believe he could be fair.

Castro's counsel argued that Juror L's slouching was an indication of his age group. The fact he watched a video on false confessions was not important because there was no indication that a false confession was presented in this case. He had a negative view of the Ferguson incident in general.

Counsel argued Juror D indicated he could be fair, but he would not enjoy revisiting some issues that reminded him of aspects of his life. He did not indicate that his relative who was sentenced to death should not be in prison.

The trial court noted that there was still one seated African-American juror. The court stated it was not its role to determine if the prosecutor's reasons were good reasons, but whether they were pretextual to hide racial bias. Juror L's statements regarding false confessions would raise a legitimate concern for any prosecutor, particularly given the case involved Silva's confession. Juror D's statement that he did not want to be part of the process would also cause any prosecutor legitimate concern. The court concluded that the challenges were not based upon racial bias and the motion was denied.

**2. Substantial Evidence Supported the Trial Court's Findings**

"Both the federal and state Constitutions prohibit any advocate's use of peremptory challenges to exclude prospective jurors based on race." (*People v. Lenix* (2008) 44 Cal.4th 602, 612.) When a *Batson/Wheeler* challenge is raised, there is a three-step inquiry. "First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*Lenix*, at pp. 612-613.)

"We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." (*People v. Burgener* (2003) 29 Cal.4th 833, 864.) We apply a deferential standard of review, examining whether there was substantial evidence to support the trial court's conclusions. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 614.)

We conclude there was substantial evidence to support the trial court's finding that the prosecutor had demonstrated race-neutral reasons for dismissal of the two jurors.

Tabron argues that the prosecutor's reliance on demeanor, namely that Juror L was slouching, was not a sufficient reason for dismissal. However, a "prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. . . ." (*Lenix*, *supra*, 44 Cal.4th at p. 613, citing *People v. Turner* (1994) 8 Cal.4th 137, 165.) Our Supreme Court has upheld a peremptory challenge based on a juror's demeanor where the juror dressed informally, had an unusual hairstyle, and refused to make eye contact. (*People v. Elliott* (2012) 53 Cal.4th 535, 569-570.) Furthermore, Juror L's slouching was a physical representation of the fact he did not want to be there, which he also voiced verbally. Additionally, as Tabron acknowledges, the prosecutor did not rely on slouching as a reason to dismiss Juror L. It was the fact Juror L

did not want to be there. The prosecutor stated: "I don't want a juror who does not want to be here."

The prosecutor's next concern for Juror L was his feelings about the criminal justice system. Juror L felt the system was "not balanced" and he had become disillusioned with becoming a police officer after the incident in Ferguson. He also voiced a concern about false confessions, which was a key issue in this case. Silva testified his confession was not voluntary and his statements to police were false. As the trial court found, Juror L's statements regarding false confessions would raise a legitimate concern for any prosecutor, especially where an alleged false confession was a key issue in the case. (See *People v. Avila* (2006) 38 Cal.4th 491, 544-546 [denying *Batson/Wheeler* motion for dismissal of an African-American juror who believed that police lie].)

As to Juror D, Tabron argues the fact that Juror D had family members who engaged in criminal behavior and were in prison was not a sufficient reason to dismiss him. However, "the arrest or conviction of a juror's relative provides a legitimate, group-neutral basis for excluding a juror." (*People v. Turner* (2001) 90 Cal.App.4th 413, 419.) Additionally, Tabron identifies other jurors who had family members who had written bad checks and faced drunk driving charges. These jurors were not similarly situated to Juror D, who had family members who sold drugs and one relative was on death row for murder. These crimes were more significant crimes and had a greater similarity to the crimes at issue in the case.

Like Juror L, the prosecutor also felt that Juror D did not want to be there. Juror D stated more than once that he wanted no part of this "type of situation." Tabron argues that a desire to not associate with the criminal lifestyle is not anti-law enforcement bias. The prosecutor, however, seemed more concerned with a juror who did not want to participate, or to be in any contact with the criminal justice system. The trial court found that Juror D's statement that he did not want to be part of the process would cause any prosecutor legitimate concern.

Tabron argues that the prosecutor's explanations are contradicted by the record, citing *People v. Arellano* (2016) 245 Cal.App.4th 1139 [prosecutor stated race-neutral reason only after disputing the juror was African-American and dismissing two other

African-American women jurors]. Here, however, the prosecutor's reasons are supported by the record. The prosecutor detailed her reasons based upon the juror's statements and the court made similar findings. Additionally, the prosecutor's acceptance of the panel containing an African-American juror strongly suggests that race was not a motive in her challenges of the other African-American jurors. (*People v. Kelly* (2007) 42 Cal.4th 763, 780.)

**B. Silva Waived His *Miranda* Rights and Provided a Voluntary Confession**

Silva, joined by both Tabron and Castro, argues the trial court erred in denying his motion to suppress his statement to police because he did not properly waive his *Miranda* rights and his confession was not voluntary.[9]

**1. Silva's Arrest and Post-arrest Statement**

Silva testified that he was arrested by officers with guns drawn. He asked Officer Gilbert to tell his father he was being arrested so his father could arrange for additional care for his mother, and Officer Gilbert relayed the message.

Silva arrived at the police station around 4:00 p.m. and was placed in a room. At 5:15 p.m. officers brought him water, and they began the interrogation around 7:00 p.m. Officers talked to him on and off until 11:00 p.m. and brought food to him.

He testified that he was clean and sober at the time of the interrogation and he understood everything that was going on. He claimed he told them what he thought they wanted to hear so he could get home. He said he had never been interrogated before like this. He had previously had more than 20 interactions with the police. He had been arrested approximately 24 times in Alameda County, 11 times in San Leandro, 6 times in Oakland

[9] "[D]efendants must allege a violation of their own rights in order to have standing to argue that testimony of a third party should be excluded because it is coerced." (*People v. Badgett* (1995) 10 Cal.4th 330, 343, italics omitted.) Tabron and Castro lack standing to raise a claim that officers violated Silva's privilege against self-incrimination. (*People v. Jenkins* (2000) 22 Cal.4th 900, 965.) Tabron and Castro do have standing to argue that admission of an improperly obtained statement violates their Fifth Amendment right to a fair trial. (*Id*. at p. 966.) Where a defendant seeks to exclude a codefendant's statement as coerced or involuntary, he must show the testimony violates his constitutional rights. (*People v. Douglas* (1990) 50 Cal.3d 468, 501, disapproved on other grounds in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.)

and 3 times by the California Highway Patrol. He had been read his *Miranda* rights many times. In 2010, Silva was arrested and advised of his *Miranda* rights and invoked his right to remain silent.

Silva testified that he used both methamphetamine and marijuana as well as drinking alcohol on the date of the robbery. His life-long use of drugs had affected his short-term memory.

Dr. Ricardo Winkel, a clinical and forensic psychologist, conducted an examination of Silva and concluded his scores indicated he was a "highly suggestable individual." Silva had a "very passive, dependent personality who avoids conflict."

**2. Suppression Hearing**

Prior to trial, Silva filed a motion in limine requesting the court conduct a hearing on the voluntariness of his confession. At the hearing, the prosecutor and the court raised the issue of whether Silva had waived his *Miranda* rights and the issue of his invocation of the right to counsel. Counsel responded that he was challenging the voluntariness of the statement, but he would also like the court to address the other issues.

The court stated that on the waiver issue, it was guided by *Berghuis v. Thompkins* (2010) 560 U.S. 370. The court heard testimony from San Leandro Police Officer Blankenship, who arrested Silva by pointing his firearm at him and requesting that he lie on the ground. He engaged in no conversation with Silva while he transported him to the police station. Neither he nor the other officer threatened or harmed Silva.

Officer Perez-Angeles testified the entire interview with Silva was recorded. Silva was placed in the interview room at 4:00 p.m. He had a drink of water at 5:15 p.m. and food from McDonald's at 9:00 p.m. Silva did not appear to be under the influence of drugs or alcohol and he did not appear mentally fatigued. The officer read Silva his *Miranda* rights off the standard form. He asked Silva if he understood his rights and Silva responded yes.

The court found that Silva's question "Do I need a lawyer?" was not an invocation of his right to counsel. The court found there was no evidence that Silva's will was overborne. Silva asked, "None of this is going to be used in court, is it?" and the officer responded, "[T]his is between you and me right now." Then Silva responded to the earlier question that

he purchased an eight ball. The court stated that Silva's question seemed to be referring to dropping off the eight ball, rather than his statement as a whole. The court found that when Silva asked if what he said was going to be used against him, he was referring not to the statement itself, but to the precise response about illegal drugs.

The court found the officers' deceptive statements were not coercive. The *Miranda* warning was proper and Silva's waiver and statement were voluntary.

**3. *Miranda* Waiver**

Silva's first argument is that his confession should have been suppressed because any implied waiver of his *Miranda* rights was negated by the officers later assertion that his statement would not be used against him.

In *Berghuis*, the case relied upon by the trial court, the defendant did not say that he wanted to remain silent or that he did not want to talk with the police. "Had he made either of these simple, unambiguous statements, he would have invoked his ' "right to cut off questioning." ' [Citation.] Here he did neither, so he did not invoke his right to remain silent." (*Berghuis v. Thompkins*, *supra*, 560 U.S. at p. 382.)

"The prosecution therefore does not need to show that a waiver of *Miranda* rights was express. An 'implicit waiver' of the 'right to remain silent' is sufficient to admit a suspect's statement into evidence." (*Berghuis v. Thompkins*, *supra*, 560 U.S. at p. 384.) Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent. (*Berghuis*, at p. 385.)

We consider both voluntariness of the waiver and whether appellant was aware of the consequences of abandoning his rights. (*People v. Whitson* (1998) 17 Cal.4th 229, 241.) On the issue of voluntariness, we consider whether the police exerted physical or psychological pressure or whether there were improper interrogation tactics. (*Ibid.*) On the issue of awareness, we consider whether defendant's judgment was clouded or otherwise impaired. (*Id.* at pp. 248-249.)

The recorded interview demonstrated that Silva was not subjected to improper interrogation tactics. There was no undue physical or psychological pressure. Silva was arrested at gunpoint and placed in handcuffs, but Silva had been arrested more than 20 times

before. Before Silva was questioned, he was given the opportunity to use the restroom and provided with a drink. During the interview, when he stated he was hungry, the officers provided him food from McDonald's.

There is no basis in the record to conclude that Silva did not understand the consequences of waiving his rights. Officer Perez-Angeles read him his rights and Silva signed the form acknowledging it. Officer Perez-Angeles asked Silva if he understood each right as he read them to him. Silva had been read his rights many times in the past and on one prior occasion he had invoked his right to remain silent. (See *People v. Whitson*, *supra*, 17 Cal.4th at pp. 249-250 [after being advised of his *Miranda* rights, the defendant affirmatively indicated that he understood these rights and he had previously been advised during of his rights in another encounter with the police six months before].)

At the start of the interview after Officer Perez-Angeles told Silva they were investigating a double homicide, Silva said he would tell him "exactly what happened." Silva's course of conduct further indicated his waiver because he freely spoke to the officers. (See *Berghuis v. Thompkins*, *supra*, 560 U.S. at p. 386.)

Silva contends the fact that he asked if this was going to be used in court after he admitted to selling crank (methamphetamine), demonstrates he did not knowingly and voluntarily waive his rights. When Silva asked if "none of this is gonna be used in court is it?" Officer Perez-Angeles replied, "This is between me and you right now, bro" and Silva said "Alright."

The trial court concluded that Silva's statement was about his own drug dealing being used against him, rather than the entirety of the conversation. Respondent argues that there is no possibility Silva could have believed the entire conversation would not be used in court. If Silva believed his statement was off the record, he would not have repeatedly lied to the officers at the start of the interview. In addition, Silva had a lengthy criminal history and had been read his *Miranda* rights numerous times. He was not acting under a misconception that anything he said to the officers was somehow "off the record."

In *People v. Samayoa* (1997) 15 Cal.4th 795, our Supreme Court rejected the defendant's contention that he believed he was speaking "off the record" because his interrogation was not being recorded. The defendant had been read his rights and even if

the officer failed to tell him the statement could be used against him in court, the defendant was "an ex-felon who would have been familiar with his *Miranda* admonitions from his previous criminal involvement." (*Id*. at p. 831.) "[W]e conclude the trial court reasonably determined that [the] defendant's explicit waiver of his Miranda rights was knowing and voluntary, and not the result of a misconception that his statements were off the record." (*Ibid.*) The same reasoning applies to Silva.

Next, Silva argues the fact that he asked if he needed a lawyer also demonstrates his waiver was invalid. Silva asked "Do I need a lawyer?" Officer Perez-Angeles responded "I can't give you any legal advice, bro." The officers proceeded with their questions and Silva asked for something to eat.

Respondent argues that Silva's statement actually demonstrates he was aware of his rights and that he could be provided with counsel. Silva's question was whether he should exercise his right to counsel because he asked not whether he had a right to a lawyer, but whether he *needed* one.

This statement was not a clear invocation of the right to counsel. In *People v. Sapp* (2003) 31 Cal.4th 240, 264, 268, our Supreme Court concluded that a defendant's statement "[M]aybe I should have an attorney" was not an invocation of his right to counsel. The statement was equivocal and inadequate to require officers to cease questioning. (*Id.* at pp. 268-269.) Similarly, the statement "Maybe I should talk to a lawyer" is not an unambiguous invocation of the right to counsel. (*Davis v. United States* (1994) 512 U.S. 452, 462; *People v. Suff* (2014) 58 Cal.4th 1013, 1068-1069 [the defendant's statement that if he was being charged, "I think I need a lawyer" was not an invocation].) Here, Officer Perez-Angeles understood Silva's statement as a question about whether he needed a lawyer that he could not answer. Silva then requested food and the interview proceeded.

Silva argues that Officer Perez-Angeles used coercive tactics to get a pliable subject to make a statement. Officer Perez-Angeles told Silva that he heard he was inside the Gonzalez home that night and implied there was evidence to support it.

Deceiving a suspect does not render a confession involuntary. (*People v. Maury* (2003) 30 Cal.4th 342, 411.) There are numerous decisions finding more intimidating and deceptive tactics proper interrogation. (See *Frazier v. Cupp* (1969) 394 U.S. 731, 739

[officer falsely told the suspect his accomplice had been captured and confessed]; *People v. Thompson* (1990) 50 Cal.3d 134, 167 [officers lied repeatedly telling the suspect they had evidence linking him to a homicide]; *In re Walker* (1974) 10 Cal.3d 764, 777 [officers told a wounded suspect he might die before he reached the hospital, so he should talk while he still had the chance].)

**4. Voluntariness of the Confession**

"Both the state and federal Constitutions bar the prosecution from introducing a defendant's involuntary confession into evidence at trial." (*People v. Linton* (2013) 56 Cal.4th 1146, 1176.) " 'A statement is involuntary if it is not the product of " 'a rational intellect and free will.' " [Citation.] The test for determining whether a confession is voluntary is whether the defendant's "will was overborne at the time he confessed." ' " (*People v. McWhorter* (2009) 47 Cal.4th 318, 346-347.) "Whether a confession was voluntary depends upon the totality of the circumstances." (*People v. Scott* (2011) 52 Cal.4th 452, 480.)

In *Linton*, the defendant claimed coercive police interrogation tactics led to his confession. He identified the repetitive nature of the questions about his sexual interests and sexual conduct, the length of the interview from morning until late afternoon, and his personal psychological characteristics. The *Linton* court found no improper police conduct. (*People v. Linton*, *supra*, 56 Cal.4th at pp. 1176-1177.) It was not improper for the officers to ask the defendant a number of times and in a number of different ways about his conduct. (*Id.* at p. 1178.) There was nothing hostile or threatening about the officers' questions or tone. (*Ibid*.) Linton was questioned for two hours and 45 minutes and spent one and a half hours doing testing. He was offered both food and drink. (*Ibid.*) Finally, the court rejected Linton's argument that his personal characteristics rendered him more vulnerable to coercion. Linton was 20 years old, lived with his parents and was unemployed. He had learning disabilities and no prior experience with the criminal justice system. (*Id*. at pp. 1178-1179.) Our Supreme Court concluded there was "no indication here of coercive tactics by the individuals interviewing defendant, including any evidence that they exploited any personal characteristics of defendant in order to obtain his admissions and confession." (*Id*. at p. 1179.) His confession was voluntary. (*Ibid*.)

Similarly, there is no evidence of improper or coercive tactics during Silva's interrogation. Silva was questioned on and off over a four-hour period and he was provided both food and drink. Silva's claim that he was stressed during the interview because he was hungry and was worried about his mother is also contradicted by the evidence. As soon as Silva said "I'm starving," the officers offered to provide him food. At the time of his arrest, Silva asked Officer Gilbert to inform his father he was being arrested and to arrange for additional care for his mother. Silva testified that Officer Gilbert relayed his message.

Silva's expert, Dr. Winkel, testified that Silva was a "highly suggestable individual" with "a very passive, dependent personality." "Insofar as a defendant's claims of involuntariness emphasize that defendant's particular psychological state rendered him open to coercion, this court has noted that '[t]he Fifth Amendment is not "concerned with moral and psychological pressures to confess emanating from sources other than official coercion." ' " (*People v. Smith* (2007) 40 Cal.4th 483, 502.)

Additionally, Silva told many lies and changed his story during the interrogation contradicting the argument that he agreed to whatever the officers suggested. The trial court found that Silva's will was not overborne because he lied during much of the interview and protected the identity of the perpetrators.

At the time of the interview, Silva was clean and sober and testified that he understood everything that was going on. Silva was a 50-year-old man who had extensive experience with the criminal justice system, including more than 20 prior arrests and a prior interrogation where he invoked his right to remain silent.[10]

We conclude under the totality of the circumstances that Silva's statement was not the result of coercion and was voluntary. Therefore, the statement was properly admitted against Silva, as well as against Tabron and Castro at trial.

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[10] Castro cites to Division Two's decision in *In re Elias V.* (2015) 237 Cal.App.4th 568 to support his argument that Silva's confession was coerced. *In re Elias V.* is readily distinguishable because it involved the "dominating, unyielding, and intimidating" questioning of a 13-year-old boy at his school away from his parents. (*Id.* at p. 586.) The dangers attendant to an interrogation of a juvenile do not apply to a 50-year-old man with extensive involvement with the criminal justice system.

### C. *Motion for Acquittal at the Close of the Prosecution's Case-in-Chief*

Tabron, joined by Castro and Silva, argues that the trial court erred in denying his motion for acquittal pursuant to section 1118.1 at the close of the prosecution's evidence.

#### 1. Motion Hearing

Tabron's counsel moved to dismiss the charges under section 1118.1 because there was no rational nexus between the murders and the felonies. He argued the robbery was over when the murders occurred. He also argued there was no evidence of kidnapping. The two victims were not the object of the robbery. Castro joined in the motion and argued that he was not a coconspirator. Silva's counsel also joined the motion and argued that Silva's statement must be disregarded as coerced. Silva was not involved in the underlying crimes, other than to aid and abet the receipt of stolen property.

The prosecution argued that both Castro and Silva were liable under the felony-murder rule as aiders and abettors. Both Raul and Mendoza testified Castro was inside the house during the robbery. Silva helped load items into his truck. The robbery and burglary were not complete at the time of the murders because appellants had not escaped to a place of safety. Forde was forced from the house by Tabron while he was making his escape from the robbery. Forde and Garcia were killed because they were witnesses or they interfered with the escape.

The court found that even if Castro and Silva had reached a place of temporary safety prior to the murders, they aided and abetted the underlying crimes so they are still as liable as the perpetrator for murder. Tabron was liable either as the shooter or as a coconspirator. There was enough of a logical nexus for it to go to a jury. The court denied the section 1118.1 motion.

#### 2. Legal Analysis

In determining whether the evidence was sufficient either to sustain a conviction or to support the denial of a section 1118.1 motion, the standard of review is essentially the same. (*People v. Houston* (2012) 54 Cal.4th 1186, 1215.) " '[W]e do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is

reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility.' " (*Ibid.*)

To be convicted of felony murder, "[t]here must be a logical connection between the cause of death and the [underlying felony]." (CALCRIM No. 540A, Bench Notes; see *People v. Cavitt* (2004) 33 Cal.4th 187, 203-204; *People v. Wilkins* (2013) 56 Cal.4th 333, 347.) The felony-murder rule does not require "a killing to advance or facilitate the felony, so long as some logical nexus existed between the two." (*Cavitt*, at p. 198.)

Two California Supreme Court cases set forth the relationship required between the felony and murder. *Cavitt* addressed the scope of accomplice liability in connection with the felony-murder rule, and *Wilkins* addressed the liability of the killer. In *Cavitt*, James Cavitt, Robert Williams and Cavitt's girlfriend, Mianta McKnight, planned and executed a robbery of McKnight's home. They tied up and gagged McKnight's stepmother, and then tied up McKnight to make it appear she was a victim as well. (*People v. Cavitt*, *supra*, 33 Cal.4th at p. 193.) The stepmother died of asphyxiation. The prosecution's theory was that the defendants were guilty of felony murder because the murder occurred as the result of the robbery. The defense theory was that McKnight deliberately suffocated her stepmother after Cavitt and Williams left the home. (*Ibid.*) The court held the felony-murder rule requires both a causal relationship and a temporal relationship between the underlying felony and the act resulting in death. (*Ibid.*) "The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction." (*Ibid.*)

Cavitt and Williams argued that McKnight killed her stepmother after they left the house for reasons unrelated to the robbery. They provided evidence that McKnight hated her stepmother and expressed a desire to kill her. (*People v. Cavitt*, *supra*, 33 Cal.4th at p. 195.) The defendants argued the court should have instructed the jury that to convict them of felony murder, the killing must have facilitated the robbery. (*Id.* at p. 196.) "We hold instead that the felony-murder rule does not apply to nonkillers where the act resulting in death is completely unrelated to the underlying felony other than occurring at the same time and place. Under California law, there must be a logical nexus—i.e., more than mere coincidence of time and place—between the felony and the act resulting in death before the felony-murder rule may be applied to a nonkiller. Evidence that the killing facilitated or aided the underlying felony is relevant but is not essential." (*Ibid.*)

In *Wilkins*, Wilkins burglarized a house and loaded large appliances into his truck. As he was driving away on the freeway, a stove fell off his truck and killed another driver. (*People v. Wilkins*, *supra*, 56 Cal.4th at p. 337.) Wilkins was convicted under a felony-murder theory. (*Id.* at p. 340.) The trial court refused to instruct the jury on the escape rule and the Supreme Court concluded that was error. (*Id.* at p. 342.) " 'Felony-murder liability continues throughout the flight of a perpetrator from the scene of a robbery until the perpetrator reaches a place of temporary safety because the robbery and the accidental death, in such a case, are parts of a "continuous transaction." ' . . . When the killing occurs during flight, . . . the escape rule establishes the 'outer limits of the "continuous-transaction" theory.' . . . 'Flight following a felony is considered part of the same transaction as long as the felon has not reached a "place of temporary safety." ' " (*Id.* at p. 345, italics omitted.)

Tabron's argument on appeal, joined by Castro and Silva, is that there was no proof of a nexus between the robbery and the Garcia homicide.[11] Tabron contends Garcia was not a victim of the robbery, burglary or kidnapping. Garcia's body was found a half block from

[11] Respondents argue that Tabron does not appear to contest he committed the underlying robbery. Tabron also does not contest the evidence related to Forde's murder or the kidnapping. Respondent provides an extensive argument about kidnapping but this issue is not raised by appellants.

the Gonzalez house. The evidence showed that Garcia was killed because of an argument between two men overheard by Raul and Mendoza.

We conclude the trial court properly denied the motion because the prosecution had presented sufficient evidence to support its theory of felony murder for Garcia. The evidence showed that Garcia and Forde had been in contact that night and he was coming to meet her after receiving her text that she was witnessing a robbery. Garcia was shot within one to two minutes after appellants left the Gonzalez home with Forde. Tabron, who did not know Forde, ordered her from the bedroom at gunpoint and led her outside. Silva testified that Tabron led a woman from the house and told her to "Get out the door." Less than a minute after Tabron left the bedroom with Forde, Raul heard a male voice say "who are you?" and another male respond "who the hell are you?" Both Raul and Mendoza heard approximately three gunshots and a woman's scream, followed by more gunshots. R.G. similarly heard gunshots that sounded a bit farther away and then gunshots right in front of the Gonzalez house.

Garcia was shot multiple times with a nine-millimeter gun. Raul testified Tabron had a nine-millimeter handgun during the robbery. Right before he left the house, he pointed a gun at each of the hostages and threatened them to stay quiet.

There was sufficient evidence for a jury to conclude that either Tabron, Taco, Jeffrey, Silva or Castro killed Garcia. There was a causal relationship beyond a mere coincidence of time and place. Garcia was coming to meet Forde and he was killed outside the Gonzales home as the robbers/kidnappers were leaving.

There was also a temporal relationship because the robbery and kidnapping were part of a continuous transaction with the murders. (*People v. Cavitt, supra,* 33 Cal.4th at p. 193.) Both the robbery and the kidnapping were ongoing when Garcia was shot. Tabron had just left the house and had Forde with him. The felonies were still in progress as Tabron had not reached a place of temporary safety. (*People v. Wilkins, supra,* 56 Cal.4th at p. 345.) Mendoza saw Castro down the block from the house after the murders. Even if Silva or Castro had left, which was not shown by the evidence, they would still be liable for felony murder because their accomplice, Tabron, had not reached a place of temporary safety. (*Cavitt, supra,* at p. 196.)

Whether Garcia was shot because he interfered with their escape, attempted to stop the kidnapping, or simply just witnessed their crimes, his death as they were fleeing the house with Forde was logically connected to the underlying felonies.

As further support for his argument, Tabron argues that the jury did not find him guilty as the shooter and they did not find the multiple murder special circumstance. In order to find the special circumstance, the jury had to conclude that Tabron actually killed Forde or had the intent to kill her. Respondent argues that the jury rejected the multiple murder special circumstance because it concluded that Tabron did not kill Forde, who was shot with an Uzi. The evidence showed he was armed with a nine-millimeter gun, so the jury could have concluded one of the other perpetrators killed Forde. But, Tabron was guilty of felony murder whether he shot Forde himself or one of his accomplices did.

The trial court properly denied appellants' section 1118.1 motion because there was sufficient evidence to prove felony murder.

**D. *The Trial Court Properly Elected Not to Give CALCRIM No. 540C***

Appellants argue that the court should have instructed the jury pursuant to CALCRIM No. 540C: Felony Murder: First Degree—Other Acts Allegedly Causing Death. Appellants' defense at trial was that the homicides were unrelated to the robbery. They assert that instruction No. 540C supported their theory of the case.

**1. Jury Instructions**

The court instructed the jury pursuant to CALCRIM Nos. 540A and 540B. Instruction No. 540A stated:

"Defendants are charged in Counts 1 and 2 with murder, under a theory of felony murder.

"To prove that the defendant who did the act that resulted in death is guilty of first degree murder under this theory, the People must prove that: [¶] 1. The defendant committed robbery or burglary or kidnapping; [¶] 2. The defendant intended to commit robbery or burglary or kidnapping; [¶] AND [¶] 3. While committing robbery or burglary or kidnapping, the defendant caused the death of another person.

"A person may be guilty of a felony murder even if the killing was unintentional, accidental, negligent or in self-defense.

"To decide whether the defendant committed robbery or burglary or kidnapping, please refer to the separate instructions that I will give you on those crimes. You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder.

"*There must be a logical connection between the cause of death and the robbery or burglary or kidnapping. The connection between the cause of death and the robbery or burglary or kidnapping must involve more than just their occurrence at the same time and place.*

"The crime of robbery or burglary or kidnapping continues until the defendant has reached a place of temporary safety.

"It is not required that the person killed be the victim of the felony." (Italics added.)

The court also instructed the jury under CALCRIM No. 540B that the "defendants may also be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death." A defendant is guilty if he intentionally aided or abetted the perpetrator of the robbery or burglary or kidnapping, and "[w]hile committing robbery or burglary or kidnapping, the perpetrator caused the death of another person." It further states: "It is not required that the defendant be present when the act causing the death occurs."

Appellants requested the court also instruct pursuant to CALCRIM No. 540C. CALCRIM No. 540C provides the same general language on felony murder as No. 540A, but includes the following language:

"The commission [or attempted commission] of the <insert felony or felonies from Pen. Code, § 189> was a substantial factor in causing the death of another person.

"A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

". . . . . .

"An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable

consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence."

The Bench Notes include the following caution for CALCRIM No. 540C: "This instruction should be used only when the alleged victim dies during the course of the felony as a result of a heart attack, fire, or a similar cause rather than as a result of some act of force or violence committed against the victim by one of the participants in the felony. (Cf. *People v. Billa* (2003) 31 Cal.4th 1064, 1072 . . . [arson causing death of accomplice]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209-211 . . . [heart attack caused by robbery]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 . . . [same]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378-381 . . . [simultaneous or coincidental death is not killing].)"

At the hearing on the jury instructions, the court stated that it would instruct with CALCRIM Nos. 540A and 540B. The court included language relating to the need for a logical connection between the cause of death and the robbery, burglary or kidnapping. Tabron's counsel requested the court add the term "continuous transaction." The court stated that it would follow the model instruction and include the language that the robbery, burglary or kidnapping continues until a defendant has reached a place of temporary safety.

Tabron's counsel argued their theory: Garcia fired an Uzi into his own leg and used that Uzi to kill Forde. The court stated that if the jury found that to be true, under CALCRIM Nos. 540A and 540B, appellants would get a not guilty verdict. The court stated that "if Noe Garcia did it, there's no way under these instructions that the[] [jury] can find any of these [appellants] guilty." The court stated: "I've considered it and I'm not going to give [CALCRIM No. 540C], essentially for the reasons stated by the CALCRIM committee in their introduction to the felony murder series, which says that they provided that instruction to account for unusual factual situations where a victim dies during the course of a felony as a result of a heart attack, a fire or similar course, rather than as a result of some act of force or violence committed against the victim by one of the participants."

The court concluded it was preferable to use CALCRIM Nos. 540A and 540B to avoid providing the jury with unnecessarily complicated instructions.

**2. Legal Analysis**

We apply a de novo standard of review. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.) The trial court has a duty to instruct on general principles of law and defenses that are not inconsistent with the defendant's theory of the case when there is substantial evidence to support giving such an instruction. (*People v. Crew* (2003) 31 Cal.4th 822, 835.)

On appeal, Tabron makes two arguments about CALCRIM No. 540C. First, he argues that there must be a logical nexus between the predicate felony and the homicide and the jury should have been instructed about the nexus pursuant to No. 540C. Second, he argues the jury should have been instructed the underlying felony must be the proximate cause of the murders.

Although the court did not provide the full No. 540C instruction, it did include the language about a logical connection between the death and the underlying felony to address Tabron's request. The court instructed the jury: "There must be a *logical connection* between the cause of death and the robbery or burglary or kidnapping. The connection between the cause of death and the robbery or burglary or kidnapping must involve more than just their occurrence at the same time and place." (Italics added.)

The Bench Notes to CALCRIM No. 540A state that there is no sua sponte duty to clarify the logical nexus between the felony and the murder, but if the issue arises the court may instruct: "There must be a logical connection between the cause of death and the [underlying felony]." (See *People v. Cavitt*, *supra*, 33 Cal.4th at pp. 203-204; *Wilkens*, *supra*, 56 Cal.4th at p. 347.) The felony-murder rule does not require "a killing to advance or facilitate the felony, so long as some logical nexus existed between the two." (*Cavitt*, at p. 198.)

The *Cavitt* court found a jury instruction need only adequately apprise the jury of the requirement of a logical nexus between the felonies and the homicide. (*People v. Cavitt*, *supra*, 33 Cal.4th at p. 203.) The fact the instruction requires that the killing is committed while the perpetrators are "engaged in the commission" of the underlying crime prevents conviction for an unrelated or coincidental homicide. (*Ibid*.)

Tabron complains that the court did not instruct the jury it must find a continuous transaction—the temporal nexus. The court instructed the jury they must find a logical connection between the robbery or burglary or kidnapping and the death. The connection between the cause of death and the robbery, or burglary or kidnapping must involve more than just their occurrence at the same time and place. The court also instructed that the crime of robbery, burglary or kidnapping continues until the defendant reaches a place of safety. This is sufficient. (See *People v. Cavitt*, *supra*, 33 Cal.4th at p. 193 ["The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit"].)

Tabron's second argument is that the court's instructions did not require the jury to find that the underlying felony was the proximate cause of the murders. CALCRIM No. 540C includes the following language: "An act causes death if the death is the direct, natural and probable consequence of the act and the death would not have happened without the act." It further specifies that an act causes death "only if it is a substantial factor in causing the death." (CALCRIM No. 540C.)

Tabron relies on *People v. Gunnerson*, *supra*, 74 Cal.App.3d 370, which held that defendants convicted of felony murder are entitled to prove that the heart attack death of the victim was "merely 'simultaneous' or 'coincidental' to the robbery." (*Id*. at p. 378.) If the robbery was not legally related to death than they were not guilty of killing required for a felony murder conviction. (*Id*. at p. 379.) To establish a duty to instruct on proximate cause, appellants would have to show the evidence reasonably suggested a possibility of an intervening cause of death independent of the burglary/kidnapping. (*People v. Huynh* (2012) 212 Cal.App.4th 285, 310-311 (*Huynh*).)

Here, the trial court rejected the notion there was an intervening cause of death. Appellants' argument rested on the theory that Garcia shot Forde. First, the trial court found if the jury believed that Garcia shot Forde, then under CALCRIM Nos. 540A and 540B, the jury could not find appellants guilty of felony murder. Second, the evidence did not support appellants' theory that some third party shot both Garcia and Forde or that Garcia shot Forde.

There was no credible evidence that Garcia was armed with the Uzi. No Uzi was found near Garcia's body or at the scene. A surveillance video that captured Garcia walking toward Blenheim did not clearly show anything in his hands. Officer Perez-Angeles testified he did not see anything in Garcia's hands in the video and the bulge that defense counsel identified was a shadow.

Garcia had five particles of gunshot residue (GSR) on his right hand. The defense argued this was evidence he fired the Uzi, but the expert who testified at trial stated that if Garcia had fired the Uzi, he would have a large amount of GSR on his hands. There was conflicting testimony about whether Garcia's hands were "bagged" and if GSR could have been wiped away. The GSR on Garcia's hand was more likely the result of him being shot at close range. Garcia had a grazing wound on his right thumb that was the likely source of the GSR.

The fact Garcia had one bullet wound from an Uzi was argued by both sides. Appellants argued it showed Garcia shot himself in the knee. The prosecution expert testified that it could have been inflicted by another shooter as Garcia was running away.

Silva never identified Garcia as the shooter. He first stated that the shooter was wearing a mask, and then identified Tabron as the shooter.

However, even if Garcia was armed *and* the jury believed that Garcia shot himself with the Uzi and then shot Forde, there was no evidence that anyone other than the perpetrators shot Garcia. The evidence showed that Tabron had a nine-millimeter gun during the robbery, and Garcia was shot with a nine-millimeter gun directly outside the house within two minutes of the robbery. There was no evidence to support the alternate theory that Esteban killed either Garcia or Forde. Finally, there was no evidence of any other secondary factor (such as a heart attack) or unrelated occurrence.

Furthermore, even if the trial court erred in failing to give the full text of CALCRIM No. 540C, the error was harmless beyond a reasonable doubt. (*People v. Wilkins, supra*, 56 Cal.4th at p. 349.) As outlined in Section C above, the overwhelming evidence showed a connection between the robbery and the murders of Garcia and Forde. Appellants suffered no prejudice given the overwhelming evidence demonstrating both the logical nexus and temporal connection between the robbery/kidnapping and murder.

### E. *Tabron's Pinpoint Instruction Regarding Felony Murder*

On appeal, Tabron, joined by both Silva and Castro, argues that because the court refused to instruct the jury pursuant to CALCRIM No. 540C, it should have given Tabron's requested pinpoint instruction.[12]

#### 1. The Requested Instruction

Tabron requested the court provide the following pinpoint instruction to the jury: "If the evidence indicates that someone other than the defendant or a coparticipant committed the fatal act, then the crime is not felony murder." The court stated that while the statement was true, the instructions already made that clear. The court told counsel it had no problem with them making that argument to the jury.

Defense counsel presented his theory of the case: Garcia went to meet his lover, Trisha Forde, and found she was with Esteban Gonzalez. He shot Forde and was going to shoot Gonzalez when the gun jammed. He shot himself in the leg. This allowed Esteban to shoot him and kill him. Tabron was not there when this happened.

Alternatively, the jury could conclude that Tabron shot Garcia because he was reacting to Garcia's shooting of Forde, which had nothing to do with the underlying felonies.

The court said if the jury believed the defense theory, then his client would not be guilty of murder and no additional instructions were necessary. The defense scenario is covered by the paragraph in the instruction that requires a logical connection between the felony and the death.

#### 2. The Pinpoint Instruction Was Duplicative and Not Supported by Substantial Evidence

" 'A trial court must instruct on the law applicable to the facts of the case. [Citation.] In addition, a defendant has a right to an instruction that pinpoints the theory of the defense." (*People v. Panah* (2005) 35 Cal.4th 395, 486, italics omitted.) A trial court is not required to give a pinpoint instruction that duplicates other instructions. (*People v. Bolden*

[12] Tabron requested two pinpoint instructions—one based on former CALCRIM No. 549 (revoked), and one on a nonparticipant committing the murder. On appeal, he appears to only contest the nonparticipant instruction.

(2002) 29 Cal.4th 515, 558.) "[W]here standard instructions fully and adequately advise the jury upon a particular issue, a pinpoint instruction on that point is properly refused." (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 857.) Furthermore, the court does not have to provide an instruction based on a defense theory where there is no substantial evidence to support it. (*People v. Mayberry* (1975) 15 Cal.3d 143, 151.)

The trial court found that the requested pinpoint instruction was duplicative. The court's instructions explained that appellants could not be convicted of felony murder if the murder was committed by someone not involved in the underlying felonies. The court stated that defense counsel could argue this theory to the jury and they did.

As respondent argues there also was not substantial evidence to support the pinpoint instruction. There was no evidence Garcia and Forde were in a romantic relationship and no credible evidence that Garcia killed Forde. They knew each other and had texted that evening, but there was nothing to support the theory that Garcia killed Forde out of jealousy on seeing her with either Esteban or Tabron. Additionally, there was no evidence linking Esteban to the murder or that he arrived during or after the robbery.

Next, Tabron argues that the court should have instructed the jury on the required logical nexus. This is simply a rehash of Tabron's argument regarding CALCRIM No. 540C. The court did instruct the jury on the required logical connection between the felony and the murder.

A court's refusal to instruct with a proposed pinpoint instruction is harmless under the *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*), if the closing argument pinpoints the asserted defense and the instructions given sufficiently address the topic. (*People v. Earp* (1999) 20 Cal.4th 826, 887; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144.) The record as a whole demonstrates that the jury was properly instructed. Counsel's arguments to the jury highlighted the defense theory that someone other than the perpetrators of the robbery committed the murders. The jury rejected the argument that Garcia, or someone else, killed Forde because it found true the robbery and kidnapping special circumstance allegations demonstrating that the jury believed Tabron or one of the robbers killed Forde.

**F. *The Trial Court Properly Declined to Instruct the Jury on Self-Defense***

All appellants argue that the court should have instructed the jury on self-defense and defense of another pursuant to CALCRIM Nos. 505 and 506.

**1. Jury Instruction Conference**

At the jury instruction conference, the court stated that it would instruct the jury: "[A] person may be guilty of felony murder even if the killing was unintentional, accidental, negligent, or in self-defense." Tabron's counsel objected that if Noe Garcia killed Forde, then Tabron could have killed Garcia in self-defense, which was not part of the robbery or kidnapping. The court said there was no substantial evidence of self-defense because Garcia was shot multiple times in the back. The court stated: "The District Attorney in this case from the beginning of the case has stated she's going only on a felony murder theory, not a malice type of theory. And I'm saying that there has been no substantial evidence so that a jury instruction should be given of a malice type of theory. Self-defense would only apply to a malice type of theory, so would imperfect self-defense." Even if Tabron killed Noe Garcia in self-defense, self-defense does not apply to the felony-murder rule.

Defense counsel argued that the court was depriving them of their defense. Counsel asked: "Is the Court saying that Mr. Joseph Tabron lost his right to self-defense because he was participating in a felony?" and the court said "Yes," citing to *People v. Loustaunau* (1986) 181 Cal.App.3d 163. The court stated that Tabron's theory was not supported by the evidence. The murder was related to the felonies because Tabron had not reached a place of temporary safety. The court stated the instructions gave adequate protection from a defendant being convicted for an unrelated murder because there must be a logical nexus between the cause of death and the robbery, burglary or kidnapping. It must involve more than just their occurrence at the same time and place.

**2. Self-defense and Felony Murder**

In *Loustaunau*, Loustaunau murdered Kelli Crain and attempted to murder Ray Livingston in the course of a burglary. (*People v. Loustaunau*, *supra*, 181 Cal.App.3d at pp. 167-168.) Appellant's "bizarre and incredible testimony" was that he was not committing a burglary, but rather looking for drugs to help the police and he acted in self-

defense because one of the homeowners attacked him with a knife. (*Id.* at pp. 168-169.) The prosecution proceeded on a theory of felony murder during the course of the burglary. (*Id*. at p. 169.) Loustaunau requested an instruction on self-defense. "The trial court properly instructed that the unlawful killing of a human being whether intentional, unintentional or accidental which occurs as a result of the commission of or an attempt to commit the crime of burglary, and where there was in the mind of the perpetrator a specific intent to commit such crime, is murder of the first degree. (CALJIC No. 8.21; Pen. Code, § 189; *People v. Dillon* (1983) 34 Cal.3d 441, 465 . . . .) The purpose of the felony-murder rule is to deter even accidental killings in the commission of designated felonies by holding the felon strictly liable for murder. [Citation.] When a burglar kills in the commission of a burglary, he cannot claim self-defense, for this would be fundamentally inconsistent with the very purpose of the felony-murder rule." (*Loustaunau*, *supra*, at p. 170.)

Felony murder "entails commission of an inherently dangerous felony, requires no proof of intent or conscious disregard of life, and renders irrelevant defenses that mitigate malice such as provocation or self-defense." (*People v. Price* (2017) 8 Cal.App.5th 409, 430; *People v. Tabios* (1998) 67 Cal.App.4th 1, 9, disapproved on other grounds, *People v. Chun* (2009) 45 Cal.4th 1172 [imperfect self-defense is not a defense to felony murder].) Malice is irrelevant to felony murder which renders self-defense and imperfect self-defense irrelevant because both doctrines are applied to the issue of the existence or nonexistence of malice.

Here, the prosecution proceeded solely on a felony-murder theory so the court was not required to instruct the jury on self-defense or imperfect self-defense. The only relevant factual inquiry for the jury was whether appellants had the intent to commit robbery, burglary or kidnapping. Any killing that resulted from that conduct was first-degree murder whether it happened intentionally, accidentally or in self-defense.

Appellants argue they were entitled to a self-defense instruction based on the defense theory that Garcia shot Forde in a jealous rage and Tabron shot Garcia in self-defense. As we have concluded earlier in this opinion, this argument fails both because the trial court found there was no substantial evidence to support this theory and because the robbery, burglary and kidnapping were ongoing at the point the murders occurred. Noe Garcia was

shot in the back seven times, undermining any argument that Tabron killed him in self-defense. There was, however, substantial evidence that Tabron and the other perpetrators had not reached a place of temporary safety. Tabron forced Forde from the house and she was murdered directly outside on the street. Several witnesses testified that the shooting occurred right after the robbers left the house. Garcia was murdered a short distance away.

Finally, by finding the special circumstances of robbery and kidnapping, the jury necessarily rejected the argument that the murders were committed in self-defense.

**G. *Lesser Included Offenses of Second Degree Murder and Voluntary Manslaughter***

Appellants argue they were charged with malice murders under section 187 in counts one and two, and thus were entitled to lesser-included offense instructions on second degree murder and voluntary manslaughter.

The amended information charged in count one: "defendants did unlawfully, and with malice aforethought, murder NOE GARCIA." For count one, it alleged the special circumstance of robbery as to Tabron. Count two alleged "defendants did unlawfully, and with malice aforethought, murder TRISHA FORDE." It alleged both the special circumstances of robbery and kidnapping for Tabron. Although the prosecution proceeded on only a felony-murder theory at trial, it did not amend the information and appellants were charged with malice murder. The jury was instructed on first degree felony murder for both a principal and an aider and abettor. The jury was not instructed on any other theory of murder.

The trial court is required to instruct the jury on lesser included offenses if there is substantial evidence that would absolve defendant of guilt for the greater offense but not the lesser. (*People v. Rogers* (2006) 39 Cal.4th 826, 866.) We conduct an independent review of whether the trial court improperly failed to instruct on a lesser included offense. (*People v. Souza* (2012) 54 Cal.4th 90, 113.) "For purposes of determining a trial court's instructional duties, we have said that 'a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.' " (*People v. Smith* (2013) 57

Cal.4th 232, 240.) The court can apply one of two tests to determine if a lesser offense is necessarily included in a greater offense: the elements test and the accusatory pleading test. (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) The elements test is satisfied if the greater offense cannot be committed without also committing the lesser offense. (*Ibid*.) "Under the accusatory pleading test, a lesser offense is included within the greater charged offense ' "if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed." ' " (*Id.* at pp. 288-289.)

Our Supreme Court has held that under the accusatory pleading test if the information alleges a murder with malice aforethought, a defendant is entitled to an instruction on the lesser included offenses if there is substantial evidence that defendant committed only the lesser offense but not the greater offense of felony murder. (See *People v. Banks* (2014) 59 Cal.4th 1113, 1160, overruled on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3 (*Banks*).) In *Gonzalez,* our Supreme court reaffirmed the holding in *Banks* that the trial court has a duty to instruct on the lesser included offenses of murder with malice aforethought if substantial evidence has been presented at trial to support a jury finding on a lesser offense. (*Gonzalez, supra*, 5 Cal.5th at p. 191.)

Our analysis here is two-fold: (1) we first must determine if there was substantial evidence to warrant a lesser included offense instruction, and (2) we must determine even if the instruction was required, if any error was harmless. The Supreme Court's recent decision in *Gonzalez* does not address the first issue and focuses on the second.[13]

**1. Substantial Evidence**

This district addressed the issue of substantial evidence in *People v. Anderson* (2006) 141 Cal.App.4th 430 (*Anderson*), where the prosecution charged first degree murder but then added the felony murder charge after the close of the evidence. Anderson argued that the trial court should have instructed on second degree murder and voluntary manslaughter.

[13] The Supreme Court stated: "we assume without deciding that substantial evidence could have supported a jury finding that defendants committed a lesser included offense of murder with malice aforethought rather than first degree murder." (*Gonzalez, supra*, 5 Cal.5th at pp. 197-198.)

(*Id*. at p. 442.) Division One held: "We find it unnecessary to resolve this question here. We assume for the sake of argument that, as the prosecution argues, the trial court would have had no sua sponte duty to instruct if felony murder were the only crime charged because second degree murder and voluntary manslaughter are not lesser included offenses of felony murder. [Citations.]" However, felony murder was not the crime charged in the accusatory pleading. (*Id.* at p. 444.) The court concluded there was substantial evidence that Anderson did not form the intent to take the victim's money until after the victim had been mortally wounded, so she was not guilty of felony murder. (*Id*. at p. 447.) The court concluded it was error for the trial court not to have instructed on second degree murder and voluntary manslaughter and under the *Watson* test, it was reasonably probable the jury would have reached a different result if properly instructed. (*Id.* at pp. 449-450.)

The Fourth Appellate District distinguished *Anderson, supra*, 141 Cal.App.4th 430 in *Huynh*, *supra*, 212 Cal.App.4th 285, in a case where, although malice murder was included in the information, the prosecution's case was strictly first degree felony murder. Unlike *Anderson*, Huynh was charged with the predicate felonies (sodomy and oral copulation) and the prosecution alleged the special circumstances. (*Huynh*, at p. 313.) Huynh knew from the start of the case that it was being prosecuted as a felony murder unlike *Anderson* where the felony-murder theory did not arise until the trial had started. (*Hunyh*, at p. 313.) The court noted that whether second degree murder is a lesser included offense of felony murder is an open question, but the instruction was not warranted because there was no substantial evidence of second degree murder. (*Id*. at pp. 314-315.)

Here, the prosecution charged appellants with malice murder so under the accusatory pleadings test, second degree murder is a lesser included offense of felony murder as charged. (*Banks*, *supra*, 59 Cal.4th at p. 1160.) Under *Anderson*, there is a duty to instruct on second degree murder if the evidence fails to indisputably show the murder was committed during the course of the felonies. (*Anderson*, *supra*, 141 Cal.App.4th at p. 447.)

But here, like in *Huynh* and unlike *Anderson*, the evidence showed the murder *was* committed during the course of the felonies. As discussed earlier, appellants' theory was that Forde left the house voluntarily with Tabron and either Garcia or Esteban shot Forde. The defense posited that Garcia was romantically involved with Forde and was upset at

seeing her with Tabron. An alternative theory proffered was that Esteban shot Forde because she was with Garcia. The evidence appellants put forth to support these theories was text messages between Garcia and Forde showing they were planning to meet; the verbal exchange overheard by the robbery victims from the house; and the fact Forde was shot with an Uzi. Appellants argued that Garcia had the Uzi. They claim this supported a finding Garcia was the aggressor and the shootings were unconnected to the robbery.

Appellants' theories, however, were just that—theories—without substantial evidence to support them. The evidence demonstrated Forde did not leave willingly with Tabron. There was no evidence Garcia and Forde were romantically involved and no evidence as to why Garcia would shoot Forde, or that Garcia was in possession of an Uzi. No Uzi was found near Garcia's body and if he had fired an Uzi, there would have been a large amount of GSR on his hands. Garcia had only a small amount of GSR on his right hand, which was likely caused by a bullet grazing his hand. The exchange overheard by Raul and Mendoza supported the prosecution's theory that Garcia happened upon the robbers, was alarmed, and was shot by them. There was simply no evidence Garcia was the aggressor because he was shot in the back multiple times.

Furthermore, there was no evidence that Esteban was ever present that night. It is purely speculation that he was the aggressor and shot either Forde or Garcia. "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

There was substantial evidence all three defendants were guilty of robbery. Tabron entered the Gonzalez house with a nine-millimeter gun and took two televisions, two laptops, and other items of value. Castro was in the house and helped carry the television from Dana's room. Castro stated that he was there to help. Even with Silva's contradictory testimony, at a minimum, he admitted helping to transport a television from the Gonzalez home.

Finally, there was substantial evidence that felonies were still ongoing when the murders happened. Tabron forced Forde to leave with him and Forde was killed in front of

the house after exiting with Tabron. The shooting occurred within one to two minutes of the robbers leaving the bedroom at the Gonzalez house. The felonies were still in progress when the deaths occurred. Raul and Mendoza both saw Tabron with the nine-millimeter gun, which was the type of gun used to kill Garcia. Silva also testified he saw Tabron with a gun.

Appellants are correct that the prosecution could not prove who fired either the nine-millimeter gun or the Uzi, but that was not the requirement; it only had to prove that one of the perpetrators did.

Further as explained above, even if we accepted appellants' version that Tabron was in some way provoked, self-defense and imperfect self-defense are not defenses to felony murder. The robbery and kidnapping were still ongoing when the murders occurred. (*People v. Loustaunau*, *supra*, 181 Cal.App.3d at p. 170.)

There was simply no evidence of malice before the jury that would have allowed them to convict appellants of second degree murder rather than felony murder. Similarly, there was no evidence to show Tabron acted in the heat of passion or based on provocation necessary for voluntary manslaughter.

However, we need not base our ruling on whether appellants were entitled to the instruction because we find any error harmless.

**2. Harmless Error**

"Our precedent holds that an erroneous failure to instruct the jury on a lesser included offense is subject to harmless error analysis under *People v. Watson*[, *supra*,] 46 Cal.2d [at page] 837 . . . , and that evidence sufficient to warrant an instruction on a lesser included offense does not necessarily amount to evidence sufficient to create a reasonable probability of a different outcome had the instruction been given." (*Banks*, *supra*, 59 Cal.4th at p. 1161; *Gonzalez*, *supra*, 5 Cal.5th at p. 201.)

In *Gonzalez*, Gonzalez, Estrada and Garcia were convicted of first degree felony murder and the jury found true the special circumstance that the murder was committed during a robbery, but did not find true the special circumstance that the principal was armed with a firearm. (*Gonzalez*, *supra*, 5 Cal.5th at pp. 191, 194.) The jury also did not find true the allegation that Gonzalez personally and intentionally discharged a firearm. (*Id*. at

p. 195.) The amended information charged all three defendants with murder with malice aforethought. (*Ibid.*) The trial court instructed the jury only on first degree felony murder without instructing on murder with malice aforethought or the lesser included offenses. (*Ibid.*) Our Supreme Court concluded that because the jury made the special circumstance finding that the murder was committed during the commission of a robbery any error in failing to provide the lesser-included instructions was harmless. (*Ibid.*)

The *Gonzalez* court held: "The failure to instruct on lesser included offenses supported by substantial evidence was state law error." (*Gonzalez, supra*, 5 Cal.5th at p. 196.) A defendant must show that a different result was reasonably probable under the *Watson* standard. (*Id.* at p. 201.) A felony-murder special-circumstance finding demonstrates the jury's determination that the defendant committed felony murder and renders the instructional error harmless. (*Id.* at p. 200.) "The special circumstance instructions required the jury to only address the special circumstance finding *after* convicting on felony murder and specified that the prosecution must prove the special circumstance allegation beyond a reasonable doubt separately as to each defendant." (*Id.* at p. 202.)

The error was harmless as to Gonzalez who was charged as the perpetrator and Garcia and Estrada who were charged with aiding and abetting. (*Gonzalez, supra*, 5 Cal.5th at p. 205.)

In his supplemental brief, Tabron seems to read our decision as concluding a robbery-murder special circumstance categorically renders any failure to provide a lesser-included instruction harmless. *Gonzalez* does not adopt this view and neither do we. The error here was harmless because the murders were committed during the course of the robbery and there was no substantial evidence for a jury to convict on the lesser included offenses.[14]

[14] Tabron raises a new argument, not raised before the trial court or previously on appeal, regarding the language in the robbery special circumstance verdict form. Tabron argues that while the court correctly instructed the jury on the robbery special circumstance, it failed to include the same language on the verdict form. We decline to consider a new

As to Tabron, the jury returned a true finding on the felony murder special circumstance allegations of robbery and kidnapping. In *People v. Castaneda*, our Supreme Court held a true finding on felony-murder special-circumstance allegations eliminated any prejudice from the failure to instruct on second degree murder as a lesser included offense. "Because 'the elements of felony murder and the special circumstance[s] coincide, the true finding[s] as to the . . . special circumstance[s] establish[ ] here that the jury would have convicted defendant of first degree murder under a felony-murder theory, at a minimum, regardless of whether more extensive instructions were given on second degree murder. [Citations.]' [Citation.] Therefore, the jury necessarily found defendant guilty of first degree felony murder, and any error in not instructing the jury concerning second degree murder was harmless beyond a reasonable doubt." (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1328; see also *Huynh, supra*, 212 Cal.App.4th at p. 315.) For Tabron, the jury's finding of felony murder and its findings of the special circumstances of robbery and kidnapping "necessarily demonstrate[] the jury's determination that the defendant committed felony murder rather than a lesser form of homicide." (*Gonzalez, supra,* 5 Cal.5th at p. 200.)

In his supplemental brief, Silva argues that unlike Gonzalez, he was not charged with a special circumstance and there was no jury finding.[15] However, even without a special circumstance finding, we can hold the error was harmless where there was not a reasonable probability the jury would have convicted Castro and Silva of the lesser included offenses.

In *Banks*, the defendant argued that the trial court erred in failing to instruct the jury on second degree murder as a lesser included offense of felony murder. (*Banks, supra,* 59 Cal.4th at p. 1157.) Our Supreme Court found that under the accusatory pleading test, second degree murder was a lesser included offense of felony murder as charged. (*Id.* at p. 1160.) The court stated that although the evidence of second degree murder was not particularly strong, it was sufficient to warrant the instruction. (*Ibid*.) The surveillance video showed that Banks approached the victim, Foster, at an ATM and some sort of

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argument at this late stage in the proceedings. (See *People v. Bolin* (1998) 18 Cal.4th 297, 330.)

[15] Castro did not file a supplemental brief.

exchange occurred that was possibly an argument before Banks shot Foster. (*Id.* at p. 1161.) The court, nevertheless, found the error harmless. (*Ibid.*) "Here, there is no reasonable probability that the evidence of an argument between defendant and Foster, minimal as it was, would have led the jury, had it been properly instructed, to conclude that [the] defendant shot Foster at the ATM out of malice unrelated to any robbery. As the trial court observed, even though there was 'some evidence' otherwise, the far more plausible inference is that the 'fellow was killed at the [ATM] to try to get money.' Thus, the trial court's failure to instruct on second degree murder was harmless." (*Ibid.*)

Similarly, here, even though there was some evidence of an exchange between Tabron and Garcia—the "Who are you?" and "Who the hell are you?" statements—this would not have led the jury to conclude the murders were wholly unrelated to the robbery or kidnapping. The more plausible inference was that Garcia happened upon the kidnapping of his friend, Forde, and was shot by the perpetrators. Further, unlike *Banks* where there was limited evidence of a robbery, here there was overwhelming evidence of a robbery and there was strong evidence of kidnapping.

We conclude it was not reasonably likely that if the jury had been instructed on the lesser included offenses, it would have reached a different result.

**H. *Jury Instruction on a Kidnapping Theory of Felony Murder***

At the conference on the jury instructions, the court stated that it would instruct the jury on felony murder under CALCRIM No. 540A and aider and abettor felony murder under CALCRIM No. 540B, and it included language relating to the need for a logical connection between the cause of death and the robbery or burglary or kidnapping. The court asked counsel: "Does anybody disagree as to whether or not those are the predicate felonies?" Castro's counsel said "No" and Tabron's counsel made a statement about burglary not being charged but said he would agree. Silva's counsel gave no oral response.

On appeal, Silva, joined by Castro, argues the court erred in instructing on the kidnapping theory of felony murder for them. Although the court instructed about kidnapping as an underlying felony, the prosecution stated in closing argument that kidnapping only applied to Tabron. And only Tabron was charged with the special circumstance of kidnapping.

A party forfeits a challenge to a jury instruction that was correct in law and responsive to the evidence if the party fails to object in the trial court. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.) The rule of forfeiture does not apply, however, if the instruction was an incorrect statement of the law (*id*. at p. 1012), or if the instructional error affected the defendant's substantial rights. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087.)

Neither Silva nor Castro argues the instruction was an incorrect statement of the law; rather, they argue the instruction should not have applied to them because there was not substantial evidence to support it. Under CALCRIM No. 540B, the jury could find Silva and Castro guilty of felony murder if they found they aided and abetted the robbery or burglary or kidnapping. There was substantial evidence that Tabron kidnapped Forde, and Forde was murdered within two minutes of being forced from the house. The jury heard evidence of both Castro and Silva's roles and could determine if there was substantial evidence each of them participated in the robbery and kidnapping. The jury was instructed: "If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider or abettor." (CALCRIM No. 401.)

We conclude there was sufficient evidence for the court to give the instruction as to Castro and Silva.[16] Furthermore, any error was harmless because the prosecutor elected to pursue the kidnapping theory of felony murder only as to Tabron. Any concern that it should not apply to Silva and Castro was remedied by the prosecutor's statements that the kidnapping only applied to Tabron and the court's instruction that some of instructions may not apply, depending on the jury's findings of fact.

In addition, given the eyewitness testimony Castro participated in the robbery and Silva's statement that he participated in the robbery, there was substantial evidence to support felony murder based on the underlying felony of robbery.

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[16] Silva argues that his counsel's failure to object amounted to ineffective assistance of counsel. Given we find the instruction was properly given, there was no prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 697.)

## I. *The Court Properly Declined to Provide an Instruction on Voluntary Intoxication for Silva*

Silva argues the trial court erred in refusing to provide a voluntary intoxication instruction for him. The court provided an instruction that the jury may consider Tabron's voluntary intoxication to determine if he acted with the intent to commit the underlying felonies but did not include Silva.

### 1. Jury Instruction

Silva requested the court give the jury a voluntary intoxication instruction as to him. The court refused the request stating: "I don't find that there's substantial evidence of intoxication at the time of the commission of the offense." Silva argued that he had a "pick me up" of methamphetamine in the morning, he smoked marijuana sometime in the afternoon and then used methamphetamine again after midnight. He also had cocktails at dinner. The court stated that given Silva's "admitted tolerance to drugs," there was no evidence it interfered with his intent to commit theft.

In his initial statement to police, Silva said that he was "a little tipsy . . . . I had a couple drinks" at the time he met Twin to get the TV. He said, "I wasn't thinkin' in my right mind or I would've thought better."

During his testimony at trial, Silva again stated that he used meth in the morning and smoked a joint in the evening. He met Tabron and Twin at a restaurant and had "half a cocktail." When he left the restaurant, he had "a little buzz." After he got home, he smoked meth and then drove to find Tabron.

### 2. There Was No Evidence Silva's Intoxication Affected His Intent to Aid and Abet the Robbery

For the court to give an instruction on voluntary intoxication, there must be "evidence from which a reasonable jury could conclude defendant's mental capacity was so reduced or impaired as to negate the required criminal intent." (*People v. Marshall* (1996) 13 Cal.4th 799, 848 (*Marshall*).) A defendant may present evidence of intoxication on the question whether he is liable for criminal acts as an aider and abettor. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1133.) Evidence that a defendant consumed alcohol or other intoxicating substances, without more, is not sufficient to warrant the instruction; there must

be some evidence from which a reasonable jury can infer that the consumption of the substance affected the defendant's actual formation of specific intent. (*People v. Verdugo* (2010) 50 Cal.4th 263, 295.)

In *Marshall*, the court held that there was insufficient evidence for a voluntary intoxication instruction where the defendant had an unspecified number of alcoholic drinks over some period of hours, but there was no evidence of the effect of the alcohol consumption on defendant's state of mind. (*Marshall*, *supra*, 13 Cal.4th at p. 848.) Where there is little evidence of intoxication and no evidence of its effect on the defendant, the court is not required to provide the instruction. (*People v. Roldan* (2005) 35 Cal.4th 646, 716, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22.)

We conclude the trial court correctly found that the evidence was insufficient to show Silva was so intoxicated that he could not form the specific intent to aid and abet the robbery.

Silva had, at most, one cocktail with dinner around 9:00 p.m. in East Palo Alto and he smoked methamphetamine sometime around midnight. There was no evidence that this rendered him intoxicated between 3:00 to 4:00 a.m. when the robbery occurred. Silva was a life-long user of methamphetamine and the trial court concluded that Silva's statement about using methamphetamine with a friend would not have rendered him too intoxicated to form the intent to aid and abet the robbery. (*People v. Roldan*, *supra*, 35 Cal.4th at p. 716 [evidence that defendant was a habitual user of marijuana did not constitute substantial evidence he was intoxicated or under the influence at the time of the crime].)

Even crediting the evidence of Silva's intoxication, there was not sufficient evidence regarding its effect on his mental state. (See *People v. Williams* (1997) 16 Cal.4th 635, 677-678.) In *Williams*, the defendant argued the trial court erroneously refused his request for an instruction on voluntary intoxication, pointing to witness testimony that when he shot the four victims, he was " 'probably spaced out,' " as well as his own post-arrest statements that he was " 'doped up' " and " 'smokin' pretty tough' " at the time of the killings. (*Id.* at p. 677.) Our Supreme Court concluded Williams was not entitled to an instruction because "there was no evidence at all that voluntary intoxication had any effect on [the] defendant's ability to formulate intent." (*Id*. at pp. 677-678.)

The evidence of Silva's potential intoxication is entirely from his own statements to police and at trial. He stated that he was tipsy and was not "thinkin' in my right mind." He also stated that when he went to get the second TV "red flags went up" and he knew "somethin' was going down." Yet he still helped take the TV from the house to his truck. Silva presented no testimony that his use of methamphetamine and his consumption of one drink six hours before affected his mental state.

Citing only federal authority, Silva argues he was deprived of due process by the court's failure to instruct on voluntary intoxication and it requires reversal per se. This is not the correct standard. (See *People v. Pearson* (2012) 53 Cal.4th 306, 325, fn. 9 ["[t]he failure to give a fully inclusive pinpoint instruction on voluntary intoxication did not . . . deprive [defendant] of his federal fair trial right or unconstitutionally lessen the prosecution's burden of proof"; accordingly, if instructional error is shown, reversal is required only if it is reasonably probable the jury would have reached a result more favorable to the defendant absent the error].) Failure to instruct on voluntary intoxication is evaluated under the *Watson* standard. (See *People v. Mendoza*, *supra*, 18 Cal.4th at pp. 1134-1135 [failure to properly instruct on voluntary intoxication subject to standard for state law error].)

We conclude the evidence Silva was intoxicated at 3:00 a.m. when he aided the robbery was minimal and there was no evidence, other than Silva's statements, that his use of drugs and alcohol had some effect on him.

### J. *Castro's Prior Theft Conviction*

Castro argues that the court improperly admitted his prior conviction pursuant to Evidence Code section 1101, subdivision (b) for theft of two bicycles.

#### 1. The Prior Offense

The prosecution moved to admit Castro's prior convictions for a 2011 theft of two bicycles and 2002 burglary of a parked car. The court stated that the prosecution sought to introduce the prior convictions to show Castro had the intent to commit burglary, which involved the intent to commit theft upon entering the house. Castro argued that there was not a sufficient similarity between the priors and the current robbery. The prosecutor

argued there was a similarity of intent and the crimes involved similar locations during similar times of day.

The court stated that in weighing the probative value versus the prejudice under Evidence Code section 352, it seemed that admitting two prior incidents invited the jury to conclude Castro "is a bad guy." The court ruled that the prosecution could introduce the 2011 theft of the bicycles, but not the earlier 2002 incident. The 2002 incident was admissible, but the probative value did not outweigh the prejudice from "doubling up" and introducing both convictions.

At trial, the prosecution introduced the testimony of the arresting officer and the victim of the 2011 theft. A.L. testified that on July 20, 2011, at approximately 5:40 a.m., he saw someone, he later identified as Castro, running off with his two bicycles.

San Leandro Police Sergeant Randall Hudson testified that at 5:40 a.m. on July 20, 2011, he responded to a call that two bicycles had been stolen approximately a half mile from Apricot and Blenheim streets. He found Castro walking with the two bicycles on 107th Avenue. Castro turned, looked at the officer, and immediately dropped the bicycles and began running away. Sergeant Hudson ordered him to stop. Castro kept running and Hudson chased him and arrested him.

The court instructed the jury: "The People presented evidence that defendant Joseph Castro committed the offense of felony theft of two bicycles occurring on July 20, 2011 that was not charged in this case.

". . . . . .

"If you decide that the defendant committed the offense, you may, but are not required to, consider that evidence for the purpose of deciding whether or not:

"The defendant acted with the intent to commit theft in this case.

"In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offense and the charged offenses.

"Do not consider this evidence for any other purpose.

"Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime."

**2. Admissibility of the Prior Theft to Show Intent**

We review the trial court's decision to admit the evidence under an abuse of discretion standard. (*People v. Rogers* (2013) 57 Cal.4th 296, 326.) " ' "Under the abuse of discretion standard, 'a trial court's ruling will not be disturbed, and reversal . . . is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " ' " (*Ibid*., quoting *People v. Foster* (2010) 50 Cal.4th 1301, 1328-1329.)

Evidence Code section 1101, subdivision (b) allows evidence of a crime, civil wrong, or other act to prove a fact other than predisposition to commit crimes, such as motive, intent, common plan, or identity. "To be admissible to show intent, 'the prior conduct and the charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance.' [Citations.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1194.) "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.)

In *People v. Davidson* (2013) 221 Cal.App.4th 966, 973, the court found evidence of prior car theft showed a defendant's intent to steal a motorcycle. The prior theft undermined defendant's claim that he innocently found the motorcycle. The motorcycle had been stolen in the early morning hours from in front of the victim's house, and it had the ignition switch wiring pulled out. (*Id*. at p. 969.) In the prior theft, the defendant took a car in the early morning hours when it was parked in front of the victim's house. The car ignition was punched out. (*Id.* at p. 973.)

Here, the trial court did not abuse its discretion in admitting the prior theft as evidence of intent under Evidence Code section 1101, subdivision (b). The evidence was sufficiently similar to support the inference that Castro harbored the same intent in the current burglary. In both cases, the thefts occurred in the early hours of the morning within a short distance of Castro's residence. Castro argues the crimes were not similar because there was no force or fear involved in the 2011 bicycle theft. Even recognizing these differences, "we disagree that these dissimilarities vitiated the inference that defendant had the same intent in each incident." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 16.) A

"distinctive similarity" between the two crimes is not necessary for the other crime to be relevant to intent. (*Ibid.*, italics omitted.) In both cases, Castro had the intent to steal.

Castro argues that the prosecution had to rely on evidence of the prior theft because there was no evidence that he intended to aid or abet the robbery/burglary. He argues that he may have just shown up at the house at 3:00 a.m. without any idea what was happening. Even if this was true, the evidence showed that Castro was made aware of what was happening because Raul testified that Castro looked into the room where the victims were being held and smiled. Mendoza testified Tabron asked Castro what he was doing at the house and Castro responded he was there to help. Raul saw Castro walking around the house during the robbery and he saw him assist Tabron with removing a TV. Mendoza saw Castro walking away from the house on Apricot Street after the murders.

Even if the court correctly concluded the evidence was material, it must be excluded if its probative value is substantially outweighed by the risk of unfair prejudice to the defendant. (*People v. Rogers*, *supra*, 57 Cal.4th at p. 331.) We review the trial court's choice to admit prior incidents under Evidence Code section 352 for abuse of discretion. (*People v. Harris* (1998) 60 Cal.App.4th 727, 736-737.) In balancing the probative value of the evidence against undue prejudice, delay or confusion, we consider the inflammatory nature of the uncharged conduct; the possibility of confusion of issues; remoteness in time of the uncharged offenses; and the amount of time involved in introducing and refuting the evidence of the uncharged offenses. (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.)

The evidence of the prior theft was not inflammatory and it took minimal time to present to the jury. There was no possibility of confusion as the jury was instructed on the role of the evidence to prove intent only. The prior incident was only two years before the current offense.

Even if the court erred in admitting the evidence of the 2011 bicycle theft, any error was harmless and does not require reversal. Castro argues that we must apply the harmless-beyond-a-reasonable-doubt test for errors that violate the United States Constitution (*Chapman v. California* (1967) 386 U.S. 18, 24), while respondent argues for the reasonable-probability test (*Watson*, *supra*, 46 Cal.2d at pp. 836-837) that applies to errors under California law. (See *People v. Malone* (1988) 47 Cal.3d 1, 22 [error in admitting

evidence pursuant to Evid. Code, § 1101, subd. (b) tested by the *Watson* harmless error standard].) We need not resolve the issue because we conclude that any error was harmless under either standard.[17]

**K. Senate Bill 1437**

After we filed our opinion December 7, 2018 affirming all convictions as to all three appellants, Castro filed a petition for rehearing bringing to our attention Senate Bill No. 1437 (Senate Bill 1437), which was signed by the Governor September 30, 2018 and became effective January 1, 2019. "Senate Bill 1437 was enacted to 'amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.' " (*People v. Martinez* (2019) 31 Cal.App.5th 719, 723 (*Martinez*).) Castro's petition argued for reversal on the ground that the jury may have convicted him of murder based on a theory that is now legally invalid. Tabron and Silva joined the petition as to their convictions.

"Substantively, Senate Bill 1437 [revises the law of felony murder] . . . by amending section 188, which defines malice, and section 189, which defines the degrees of murder, and as now amended, addresses felony murder liability. Senate Bill 1437 also adds" a procedure authorizing recall of a sentence imposed under now superseded felony murder principles, and resentencing on specified criteria, thus allowing "those 'convicted of felony murder or murder under a natural and probable consequences theory . . . [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts . . . .' " (*Martinez*, *supra*, 31 Cal.App.5th at p. 723, quoting § 1170.95, subd. (a).) This sentencing recall and resentencing procedure—which is available to offenders whose sentences are final, as well

[17] Appellants argue cumulative error. We have analyzed each of appellants' individual claims and found no error, so there can be no cumulative error. (*People v. Williams* (2013) 56 Cal.4th 165, 201.)

as those, like the three appellants in this case, whose sentences are not yet final—is set forth in considerable detail.

A petitioning offender must first make out a prima facie case demonstrating eligibility for relief. Eligibility for relief may be shown "where all three of the following conditions are met: '(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine[;] [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder[;] [¶] [and] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.' " (*Martinez, supra,* 31 Cal.App.5th at p. 723, quoting § 1170.95, subd. (a)(1)-(3).)

"The trial court must then hold a hearing 'to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not . . . previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence.' (§ 1170.95, subd. (d)(1).) 'The parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing. If there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence the petitioner.' (§ 1170.95, subd. (d)(2).) Significantly, if a hearing is held, '[t]he prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.' (§ 1170.95, subd. (d)(3).) '[T]he burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing.' (§ 1170.95, subd. (d)(3).) 'If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges.' (§ 1170.95, subd. (d)(3).)" (*Martinez, supra,* 31 Cal.App.5th at pp. 723–724.)

With that background in mind, we conclude there is no question Senate Bill 1437 is retroactive. The Legislature was unmistakably clear about that. While we have no trouble seeing Senate Bill 1437's retroactivity, the harder question is how, procedurally, offenders who wish to avail themselves of the ameliorative provisions of Senate Bill 1437 must press their arguments for retroactive application in cases where there are pending appeals. For those offenders whose convictions are final, having exhausted the appellate process, the Legislature established a mechanism—the petition procedure before the sentencing court under section 1170.95. But because their convictions are not yet final, Tabron, Castro and Silva argue that they have the option of asking us to apply the newly revised law of felony murder as a basis for reversal in their pending appeals, thus giving them a more immediate avenue of potential relief. We decline to attempt to construct an ad hoc appellate procedure equivalent to section 1170.95, granting the parties the same rights they would have in a petition procedure before the sentencing court. To the extent any of the appellants is eligible for section 1170.95 relief, he must seek it in the trial court.[18]

Our holding on this issue follows and applies *Martinez*, *supra*, 31 Cal.App.5th at pages 724–730, where a panel in Division 5 of the Second District Court of Appeal rejected the reading of Senate Bill 1437 Tabron, Castro and Silva now proffer. Citing cases construing and applying analogous ameliorative statutes enacted by Prop 36 (*People v. Conley* (2016) 63 Cal.4th 646 (*Conley*)), and Prop 47 (*People v. DeHoyos* (2018) 4 Cal.5th 594 (*DeHoyos*)), the *Martinez* court held that "[t]he analytical framework animating the decisions in *Conley* and *DeHoyos* is equally applicable here. Like Propositions 36 and 47, Senate Bill 1437 is not silent on the question of retroactivity. Rather, it provides retroactivity rules in section 1170.95. The petitioning procedure specified in that section applies to persons who have been convicted of felony murder or murder under a natural and probable consequences theory. It creates a special mechanism that allows those persons to file a petition in the sentencing court seeking vacatur of their conviction and resentencing.

[18] Tabron filed a request for judicial notice simultaneously with his supplemental brief on rehearing. He requested that we take notice of the record on appeal in his brother's related case, *People v. Jeffrey Tabron*, case No. A147246. We deny this request on relevance grounds. (Evid. Code, §§ 210, 350, 452, 459.)

In doing so, section 1170.95 does not distinguish between persons whose sentences are final and those whose sentences are not. That the Legislature specifically created this mechanism, which facially applies to both final and nonfinal convictions, is a significant indication Senate Bill 1437 should not be applied retroactively to nonfinal convictions on direct appeal." (*Martinez, supra,* at p. 727.) The holding and the analysis in *Martinez* have now been adopted by three other Court of Appeal panels in published opinions. (See *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1147, 1153; *In re Taylor* (2019) 34 Cal.App.5th 543, 561–562; *In re R.G.* (2019) 35 Cal.App.5th 141, 151.)

We too find the *Martinez* panel's reasoning persuasive and will adopt it. While Senate Bill 1437 is unquestionably retroactive, its retroactive effect is statutorily channeled through section 1170.95 in all cases, final and nonfinal alike. Just as the defendant in *Martinez* did, Tabron, Castro and Silva "resist[] this conclusion, arguing *Conley* and *DeHoyos* are distinguishable because the petitioning procedures enacted by Propositions 36 and 47 conditioned sentencing relief on a trial court finding that the defendant would not pose an unreasonable risk of danger if released, and section 1170.95 contains no such requirement." (*Martinez, supra,* 31 Cal.App.5th at p. 728.) As the *Martinez* court explained, "[w]hile defendant is correct that section 1170.95 does not require a dangerousness determination, neither *Conley* nor *DeHoyos* holds that inquiry was the indispensable statutory feature on which the result in those cases turned. To the contrary, *Conley* notes '[o]ur cases do not "dictate to legislative drafters the forms in which laws must be written" to express an intent to modify or limit the retroactive effect of an ameliorative change; rather, they require "that the Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it." ' " (*Martinez, supra,* at p. 728, quoting *Conley, supra,* 63 Cal.4th at pp. 656–657.) We think that degree of clarity is expressed by the Legislative choice to provide a detailed mechanism for applying Senate Bill 1347 retroactively via section 1170.95 without drawing any distinction for final and nonfinal cases.

## IV.

## DISPOSITION

The judgment is affirmed. The appellants may file petitions under section 1170.95, subdivision (a) seeking whatever relief may be available to them. We express no view as to their eligibility for Senate Bill 1437 relief, or, assuming eligibility, whether relief may ultimately be warranted in any of the three cases.

_____
STREETER, J.

We concur:

_____
POLLAK, P.J.

_____
TUCHER, J.